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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. ——

HERBERT BROWNELL, JR., ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Herbert Brownell, Jr., Attorney General, as successor to the Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on June 10, 1954.

OPINIONS BELOW

The opinion of the Chief Hearing Examiner for Debt Claims, Office of Alien Property, is set forth in Appendix A, *infra*, at pp. 24–28. The decision of the Director, Office of Alien Property, appears at R. 36–39. A transcript of the oral opinion of

the District Court appears at p. 23, *infra*. The opinion of the Court of Appeals (not yet reported) is printed at pp. 15–21, *infra*.

JURISDICTION

The judgment of the Court of Appeals (*infra*, pp. 23–23) was entered on June 10, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, in a proceeding under Section 34 of the Trading With the Enemy Act, which provides for the payment out of vested property of the "debts" of the former owners, the Attorney General, as successor to the Alien Property Custodian, is required and authorized to pay interest on the principal of the debt for the period subsequent to the vesting of the property.

STATUTES INVOLVED

The relevant provisions of the Trading With the Enemy Act, as amended, are set forth in Appendix B, *infra*, pp. 29–43.

STATEMENT

J. A. Henckels, K. G. ("Henckels"), a national of Germany, owed the respondent the principal sum of $100,060 on bills of exchange drawn under the German-American Standstill Agreement of 1940. The principal sum became due and payable on May 31, 1941, and by the terms of the

Agreement interest began to run from August 18, 1941 (R. 34, 39).

The Alien Property Custodian vested property of Henckels by several vesting orders, beginning August 8, 1942 (Vesting Order No. 68, July 30, 1942, 7 F. R. 6181; Vesting Order No. 766, January 25, 1943, 8 F. R. 2452; Vesting Order No. 770, January 27, 1943, 8 F. R. 2453; Vesting Order No. 5225, September 14, 1945, 10 F. R. 11913).

On April 17, 1946, the respondent filed a Notice of Claim with the Alien Property Custodian for the principal sum of $100,060, with interest thereon from August 18, 1941, at the rate of 4.7% per annum. The Office of Alien Property allowed the claim for principal and the principal amount was paid August 15, 1951 (R. 40). Subsequently, the Director of the Office of Alien Property, acting for the Attorney General, granted a motion of the Chief of the Claims Branch of that Office to dismiss the claim for interest insofar as it related to interest subsequent to August 8, 1942, the date of the first Vesting Order, but denied the motion to dismiss the claim for interest from August 18, 1941, to August 8, 1942 (R. 38–39).

In accordance with Section 34 (e) of the Act the respondent filed in the District Court for the District of Columbia a complaint for review of the disallowance of the claim for post-vesting interest (R. 34). The complaint alleged the facts as stated above and prayed an order requiring the petitioner to pay interest from

August 8, 1942, at 4.7 per cent. The petitioner's answer admitted the principal amount of the debt, $100,060, and stated that the principal had been paid to respondent and that interest had been allowed from August 18, 1941 to August 8, 1942, but had been disallowed for the period subsequent to the first vesting (R. 39).

Both sides moved for summary judgment (R. 40). At the argument on the motion the parties stipulated that the rate of interest, if allowed, should be 3.25 percent (R. 41). The District Court denied the petitioner's motion and granted that of respondent (R. 41), and entered an order for the payment of interest at the rate of 3.25 percent from August 8, 1942 (R. 41–42). On appeal the Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals runs counter to the well-settled rule that the United States is not to be required to pay interest in the absence of express statutory provisions therefor.[1] Here all the elements of that rule are present: Section 34 does not mention interest and provides merely for equitable application of vested property to "debts". The proceeding is clearly a suit against the United States. *Banco*

[1] See *United States* v. *Tillamooks*, 341 U. S. 48; *Albrecht* v. *United States*, 329 U. S. 599; *Smyth* v. *United States*, 302 U. S. 329, 353; *United States* v. *Verdier*, 164 U. S. 213; *United States* v. *Sherman*, 98 U. S. 565. Cf. *United States* v. *Thayer-West Point Hotel Co.*, 329 U. S. 585, 590.

Mexicano v. *Deutsche Bank,* 263 U. S. 591. The petitioner was sued as an officer of the United States. *Becker Co.* v. *Cummings,* 296 U. S. 74. And the enemy property out of which payment is to be made is property to which the United States has absolute title and over which it has full power of disposition. *United States* v. *Chemical Foundation,* 272 U. S. 1; *Cummings* v. *Deutsche Bank,* 300 U. S. 115.

The court below rested its decision on the authority of *Miller* v. *Robertson,* 266 U. S. 243, in which this Court held, in a suit under Section 9 (a),[2] that the rule of sovereign immunity from liability for interest did not apply because "the claim was not against [the United States]" (p. 257).

The rationale of *Miller* v. *Robertson,* however, is that, under the Act as it then stood, the enemy debtor was to be regarded as the real defendant.[3] Thus, at page 259 of the opinion, the Court stated:

> The proposition that the enemy defendants, as a matter of law, are entitled to

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[2] Section 34 has replaced Section 9 (a) as the remedy for creditors. *Cabell* v. *Clark,* 162 F. 2d 153 (C. A. 2); *Alley* v. *Clark,* 71 F. Supp. 521 (E. D. N. Y.).

[3] Plainly, this Court did not mean that the United States may be required to pay interest on the debt of another on the basis of statutory language which would not justify such a requirement with respect to a debt of the United States; in either case there is a disposition of property of the United States, and the Congress must indicate its will. See *United States* v. *McKee,* 91 U. S. 442.

be relieved from interest during the war cannot be sustained.

And see *Hicks* v. *Guinness*, 269 U. S. 71, 79, 81, in which the Court referred to the Custodian as defending "in the interest of the German debtors". The enemy was regarded as the real defendant because the United States had made no provision for devoting the property to its own purposes (*White* v. *Mechanics Securities Corp.*, 269 U. S. 283), and it was expected that ultimately the residue, after payment of debts, would be returned to the former owner.[4]

But while the Trading with the Enemy Act had a conservatory purpose at the time that *Miller* v.

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[4] In the 1917 Act the last paragraph of Section 12 reads in part:

> After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct.

In 1920 a committee of the House of Representatives said:

> The United States * * * does not intend to confiscate this property. It was the intention of Congress when the property was taken that it should merely be held in custody during the war, and that, after the war, the property or its proceeds should be returned to the owners. [House Report No. 1089, June 2, 1920, 66th Cong., 2d Sess., p. 3.]

In 1924, when this Court decided *Miller* v. *Robertson*, Congress had just provided for partial returns of vested property to the former owners. 42 Stat. 1511, adding Sections 9 (b) (9), (10) and (11) to the Act. Further provisions for return were subsequently promulgated in the Settlement of War Claims Act of 1928, 45 Stat. 270.

Robertson was decided, an entirely different philosophy underlies the World War II amendments to the Act, including Section 34, involved here, which came into the law in 1946. These amendments make plain that World War II vested property is in every sense property of the United States, which is being held for the use and benefit of the nation, and is not merely being held temporarily in anticipation of return to the enemy. Consequently, a debt claim can now be regarded only as an assertion of right against the United States, and not as a claim of right against a private party in which the interest of the United States is merely that of an indifferent stakeholder.

The basic change came with the 1941 amendment to Section 5 (b) of the Act (*infra*, pp. 29–30), providing for the affirmative use of vested property in the interest of and for the benefit of the United States. It substituted for the rigid conservatory system of the previous war a system of flexible powers which enabled this nation to make prompt and effective use of enemy assets without regard for the interests of the former enemy owners. See, generally, *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480. As indicated below, Section 34 and other sections added in 1946 reflect the same basic alteration in the statutory scheme. Section 39 (*infra*, pp. 42–43), added in 1948 by the War Claims Act, 62 Stat. 1240, expresses

most clearly of all the sharp break with the World War I statutory scheme. That Section unequivocally declares that:

> No property or interest therein of Germany, Japan, or any national of either such country vested * * * at any time after December 17, 1941, * * * shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein.

It was adopted in "the firm resolve not to permit the recurrence of events which after the close of World War I led to the return of enemy property to their former owners". House Report No. 976, 80th Cong., 1st Sess., p. 2.[5]

The War Claims Act of 1948 not only made explicit statement of the policy of non-return; it affirmatively provided that the net proceeds from

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[5] The Report went on to state (pp. 2–3):

> The policy of nonreturn and noncompensation is a sound public policy which should be enacted into law * * *
>
> The position of Germany and Japan (with respect to war claims against those countries) is somewhat analogous to that of a bankrupt against whom claims are apt to be filed in an amount greatly in excess of the bankrupt's assets. The legitimate claims of the United States alone, on account of the expense incurred in fighting World War II, will most likely exceed many times the assets available for payment even over a considerable period of years. Under these circumstances it is therefore not only expedient but just and fair for the United States to marshal all Japanese and German assets which are available in this country.

vested property, remaining after administration in accordance with the provisions of the Trading with the Enemy Act, should be covered into a War Claims Fund and used to pay compensation to certain classes of United States nationals who suffered as a result of German and Japanese wartime acts.

By Section 34 (*infra*, pp. 33–40), Congress had, two years earlier, provided that the Custodian should pay American creditors of the former owners of vested property, making distribution on an equitable rather than a "first come, first served" basis.* The Section provides, *inter alia*, that "No debt claim shall be allowed * * * if it was not due and owing at the time of such vesting or transfer * * *". There is no suggestion in the text that the United States shall pay interest on the pre-existing debt for the period subsequent to

*Under the World War I scheme, debt claims under Section 9 (a) were paid in the order that they were allowed. In *Markham* v. *Cabell*, 326 U. S. 404, this Court reserved decision as to the effect of amended Section 5 (b) upon the requirement that the Custodian pay debt claims. This reserved question was mooted when Congress, by Section 34, provided a new and exclusive debt claims remedy.

New Section 34, in contrast to Section 9 (a), provides that where the aggregate of debt claims filed exceeds the vested property of the debtor, there shall be *pro rata* payments under a system of priorities patterned on the Bankruptcy Act. See Sections 34 (f) and (g); Senate Report No. 1839, 79th Cong., 2d Sess., p. 8. In bankruptcy, as a general rule, interest stops on the date of the petition. *Beecher* v. *Leavenworth State Bank*, 192 F. 2d 10 (C. A. 9), certiorari denied, 343 U. S. 953.

vesting. It is wholly lacking in any express provision for interest, as is required under this Court's decisions.

The legislative history of Section 34 is silent with respect to the payment of interest.[7] Once again, however, the history make it plain that Congress regarded the United States as the full equitable, as well as the legal, owner of the former enemy property. Thus, the Assistant General Counsel of the office of Alien Property Custodian pointed out:

> The debtor has nothing to say about the vested property, since the property has become the property of the United States, and under the clear holding of the Supreme Court the act of vesting has divested the debtor of any interest in the property until Congress chooses, if it does, to return it to him. [House Hearing Subcommittee No. 1, Comm. on Judiciary, on H. R. 4840, 79th Cong., 1st Sess., p. 119.]

See also, H. Comm. on Judiciary, Hearings on H. R. 5089, 79th Cong., 2d Sess., pp. 21, 141, 159; S. Comm. on Judiciary, Hearings on S. 2378 and 2039, 79th Cong., 2d Sess., p. 95.

Moreover, the committee reports on the bill as passed pointed out that the estimated total of debt

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[7] The court below quoted (*infra*, p. 20) from the Senate Report (p. 4):

> Section 34 is not a radical departure from the treatment of debt claims in World War I, since the principles of payment and of judicial determination are preserved. *There is no intent to depart from 'estab-*

claims greatly exceeded the estimated value of the assets that would be available for payment, and gave as a reason for excluding alien creditors under Section 34 that to permit them to recover would seriously reduce the surplus of enemy assets available to the United States for disposition in the public interest.* House Report No. 2398, 79th Cong., 2d Sess., pp. 10, 11; Senate Report No. 1839, 79th Cong., 2d Sess., pp. 3, 5.

Congress also recognized the primacy of the interests of the United States in Section 34 (d) (*infra,* pp. 35–36). Thus, it provided that the Custodian is not to be required to sell or liquidate vested property for the purpose of paying debt claims. If the money available for debt claims is insufficient for payment in full, ratable payments are to be made, with additional payments "whenever the Custodian shall determine that substantial further money has become available". Under Section 9 (a), creditors had been entitled

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lished judicial precedents in this field, with respect to such matters as what constitutes a "debt", except where express changes would be made by section 34. *The principal change is from "first come, first served" to "equitable distribution"*. [Italics in opinion.)]

In the context of the whole report this statement seems to refer to the limitation of "debt" claims to contract claims, as under Section 9 (a) (*Miller* v. *Robertson*, *supra*; *Stasi* v. *Markham*, 69 F. Supp. 163 (D. N. J.); and see Section 34 (g)), and to the idea that there would not be enough assets to pay all creditors.

* Alien, non-enemy creditors were not barred under Section 9 (a).

as of right to payment out of any property on hand.

In Section 36 (*infra*, pp. 40–42), enacted concurrently with Section 34, Congress provided that the vesting of property was not to "render inapplicable any Federal, State, Territorial, or local tax for any period prior or subsequent to the date of such vesting". As stated in House Report No. 2398, *supra*, pp. 15–16, the purpose was to prevent property of the United States from obtaining an undue competitive advantage. Significantly, Section 36 also provides that no interest on taxes is payable from the date of vesting, so long as the property is held by the Custodian. It seems unlikely that Congress intended that government tax agencies should be in a less favorable position as regards interest than private creditors.

In summary, we submit that vested property is in every sense property of the United States in which, under the law as it now stands, the former enemy owners have no interest whatsoever; that Congressional authorization to pay debt claims to American creditors (Section 34) makes no provision allowing the payment of post-vesting interest; that *Miller* v. *Robertson*, which required the payment of such interest on World War I debt claims allowed under Section 9 (a), is not controlling since it is based on considerations which were applicable to the Act in its then form but which are not pertinent to the World War II Act; and that there is no basis, under the

prevailing scheme of the statute, for departing from the settled rule that the United States may not be required to pay interest in the absence of an express direction by Congress.

2. The question presented has substantial importance. At the present time, over 40,000 claims for "debts" are pending in the Office of Alien Property, the amounts claimed aggregating between $450,000,000 and $500,000,000. Although no exact estimate can be made, the amounts of money which depend upon the rule as to interest are, obviously, very large. In the instant case, the post-vesting interest, at a low stipulated rate, will approximate $40,000 on an original debt of $100,060.[9] The decision of the court of appeals, if it stands, will necessarily deplete to a very considerable degree the sum of money which would otherwise be available for the War Claims Fund and the purposes which that Fund is designed to serve.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

SEPTEMBER 1954.

[9] In other instances the interest will have to be figured for comparable periods at the applicable contract or statutory rates.

APPENDIX A

In the United States Court of Appeals for the District of Columbia Circuit

No. 11880

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, APPELLANT

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided June 10, 1954

Mr. George B. Searls, Attorney, Department of Justice, for appellant.

Mr. Christopher M. Jenks, with whom *Messrs. Samuel B. Stewart, Jr.* and *E. F. Colladay* were on the brief, for appellee.

Before CLARK, WILBUR K. MILLER and PRETTYMAN, Circuit Judges.

CLARK, *Circuit Judge:* This case involves an interpretation of the Trading With the Enemy Act.[1] No dispute exists as to the facts. Prior to the imposition of freezing controls on German assets on June 14, 1941, J. A. Henckels, K. G., a

[1] 40 Stat. 411 (1917), as amended, 50 U. S. C. App. § 1, et seq. (1952).

national of Germany, became indebted to appellee in the principal amount of $100,060. The indebtedness was represented by bills of exchange which became due and payable on May 31, 1941, with interest from August 18, 1941, at the rate of 4.7[2] percent. On August 8, 1942, the Alien Property Custodian[3] issued the first of a series of orders vesting Henckels' property.

Thereafter, appellee, a national banking institution, filed a timely notice of claim under the provisions of Section 34(a) of the Trading With the Enemy Act,[4] asserting its *debt claim* for the principal amount above-mentioned, with interest from August 18, 1941, to date of payment. The Director, Office of Alien Property,[5] by his decision dated August 27, 1952,[6] *allowed* the principal amount of the debt claim, with interest from August 18, 1941 (contract date when interest commenced to accrue) to August 8, 1842 (date of first vesting order). But, the Director *disallowed* so-called post-vesting interest, *i. e.*, interest accru-

[2] Pursuant to a stipulation entered into by the parties during proceedings in the District Court, it was agreed that interest, if allowed, should be payable at the rate of 3.25 percent. However, the rate of interest, itself, is not in issue.

[3] *See* footnote 5, *infra.*

[4] 60 Stat. 925 (1946), 50 U. S. C. App. § 34 (a) (1952).

[5] With certain exceptions not pertinent to the case, all functions vested by law in the Alien Property Custodian were transferred to the Attorney General by Reorganization Plan No. 1 of 1947, 61 Stat. 951, 12 Fed. Reg. 4534 (1947). Under the authority thereby conferred, the Office of Alien Property was established within the Department of Justice.

[6] Debt Claim No. 5024, Docket No. 51-34DC-M105, Office of Alien Property, Department of Justice.

ing after August 8, 1942, citing *Kay* v. *McGrath*[7] as authority for his conclusion. From this disallowance of post-vesting interest, appellee-Bank filed a complaint for review in the U. S. District Court for the District of Columbia as permitted by the statute.[8] On appellee's motion for summary judgment, the District Court entered an order without opinion reversing the Director and allowing post-vesting interest.[9] The Government appeals from the trial court's order of reversal.

Thus, we are presented with the single question of whether or not, as a matter of law, the amended Act authorizes payment of *post*-vesting interest, as well as *pre*-vesting interest, to a creditor whose claim matured prior to the outbreak of hostilities and whose statutory right to recover the principal amount is conceded. Because we believe this problem is not a difficult one when reduced to fundamentals, we think it would be helpful as a preliminary to further discussion to restate the nature of the relations between the parties. First, there was a matured debt with a contract provision for interest running from Henckels to appellee. Second, no one can doubt, inter se, appellee's right to receive, and Henckels' duty to pay, interest on the bills of exchange until payment of the principal. Finally, following acquisition of the debtor's property by the United States, does the statute contain language

[7] *Anita Kay* v. *McGrath*, Civil No. 456–49, D. C. D. C., November 6, 1950.

[8] 60 Stat. 927 (1946), 50 U. S. C. App. § 34 (e) and (f) (1952).

[9] *Bank of America N. T. & S. Ass'n* v. *McGranery*, Civil No. 4763–52, D. C. D. C., June 1, 1953.

which modifies the pre-existing creditor-debtor relationship so as to entitle the creditor to interest on its debt claim for one period but not for another?[10]

Following World War I, debt claims were governed by Section 9 of the Act. During that period, there was no express provision for the payment of interest on debt claims. When the Supreme Court was first presented with the issue of whether or not an allowance of interest was authorized under the Act as it then stood, and as a preliminary observation on the general rights of American creditors seeking satisfaction of their debts out of vested assets, the Court's opinion laid down the following basic consideration: "This provision [*i. e.*, Section 9] is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered." *Miller* v. *Robertson*, 266 U. S. 243, 248, 69 L. Ed. 265, 45 S. Ct. 73 (1924). After full discussion, the Court held that interest was payable under the Act from the time the debt matured until pay-

[10] It may be noted that appellant concedes that the net proceeds from the sale, use, or other disposition of Henckels' property would be sufficient to pay this claim in full, including post-vesting interest. In the event that the debtor's property was insufficient to meet the creditor's claim, we do not perceive that the United States would incur liability for any discrepancy which might arise therefrom. *Compare* subsections (e) and (f) of § 34, 60 Stat. 927, 50 U. S. C. App. § 34 (e) and (f) (1946). These subsections, in themselves, seem to negative the suggestion that debt claims are claims against the United States because the extent of recovery is controlled by the sufficiency of identifiable enemy funds.

ment of the principal amount in full. It was further stated that

> "While the suit * * * is one against the United States, the claim was not against it. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity from liability for interest * * * does not apply." *Miller* v. *Robertson, supra,* at page 257.

While appellant concedes the authority of the *Miller* case during the years prior to 1941, we are told that its authority was doubtful from 1941 to 1948. Subsequent to 1948, and for purposes of ascertaining the law applicable to this case, appellant contends that the 1941,[11] 1946,[12] and 1948[13] amendments to the Act—either individually or in combination—invalidate the rationale of the *Miller* case insofar as *post-vesting* interest is concerned.

These amendments are said to have drastically changed the fundamental nature of the Act as it was known and construed during the post-World War I era. Namely, that since 1948, and perhaps as early as 1941, the United States acquired something more than a custodial interest in the enemy property held by it so as to characterize Section 34 proceedings not only as suits against a sovereign but also as claims against a sovereign; and therefore, the rule of sovereign immunity from liability for interest bars appellee's claim for interest after the date when Henckels' property was vested. We think this argument is contrary

[11] 55 Stat. 839 (1941), 50 U. S. C. App. § 5 (b) (1952).
[12] 60 Stat. 925-928 (1946), 50 U. S. C. App. § 34 (1952).
[13] 62 Stat. 1246 (1948), 50 U. S. C. App. § 39 (1952).

to recent judicial decisions [14] which have subjected Sections 5 and 39 to exhaustive analysis encompassing legislative history, prior cases and other sections of the Act. The conclusions reached are clear. They do not support appellant's contentions.

While Section 9 was not repealed at the time Section 34 was enacted, its provisions pertaining to debt claims were superseded by the new section.[15] The Congressional reports explicitly stated the primary reason for revising the procedures theretofore applicable to debt claims processed under Section 9 and the limited scope which was intended to be given to the revision.[16]

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[14] As to § 5 (b), *see* Clark v. Uebersee Finanz-Korp., 332 U. S. 480, 486–487, 92 L. Ed. 88, 68 S.Ct. 174 (1947). As to § 39, *see* Guessefeldt v. McGrath, 342 U. S. 308, 315–319, 96 L. Ed. 342, 72 S.Ct. 338.

[15] § 34 (i) provides: "The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian * * *, or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section * * *. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. * * *."

[16] "Section 34 is not a radical departure from the treatment of debt claims in World War I, since the principles of payment and of judicial determination are preserved. *There is no intent to depart from established judicial precedents in this field, with respect to such matters as what constitutes a 'debt'*, except where express changes would be made by Section 34. *The principal change is from 'first come, first served' to 'equitable distribution'.* [Emphasis supplied.] Sen. Rep. No. 1839, 79th Cong., 2d Sess. 4 (1946); H. R. Rep. No. 2398, 79th Cong., 2d Sess. 10 (1946).

The substantive provisions of the two sections, insofar as they relate to debt claims, are similar. Both sections are silent as to payment of interest. We find nothing in the Act or the decisions under it which would cause us to depart from the reasoning of that portion of the *Miller* Case pertaining to allowance of interest. In *Kay* v. *McGrath, supra,* an American citizen filed a claim under Section 34 seeking payment of delinquent alimony, with interest at the rate prescribed by state statute, out of vested property once owned by her former husband, a German citizen. The District Court confirmed the administrative determination that alimony was a "debt claim" within the meaning of Section 34. But, after stating that the *Miller* "[C]ase is still controlling", the Court nevertheless denied post-vesting interest by distinguishing an allowance of interest on accrued alimony from an allowance of interest on strictly contractual obligations. We are not persuaded that such a distinction is justifiable by a reading of the Act. In any event, the case does not purport to abrogate the *Miller* rule when, as in the present situation, interest flows from contract.

Affirmed.

In the United States Court of Appeals for the District of Columbia Circuit

April term, 1954

No. 11880

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, APPELLANT

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, APPELLEE

Appeal from the United States District Court for the District of Columbia

Before CLARK, WILBUR K. MILLER, and PRETTYMAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the order granting plaintiff's motion for summary judgment and the judgment setting aside defendant's determination with respect to the allowance and payment

of interest on the claim involved in this cause be, and the same are hereby, affirmed.

Dated: June 10, 1954.

Per Circuit Judge CLARK.

United States Court of Appeals
for the
District of Columbia Circuit

Filed June 10, 1954

JOSEPH W. STEWART, *Clerk.*

Reporter's Transcript of the Oral Opinion of the District Court

The Court is of the opinion that in view of the fact that it has been held prior to the recent amendments to the Alien Property Act there was power to allow interest on debt claims, there is nothing in the amendments or in any alleged change of the statutory scheme which would require a change of rule as to the question of interest. The Court therefore concludes that the Attorney General, acting as the successor to the Alien Property Custodian, has the power to allow interest on debt claims even for the period subsequent to the seizure of the property.

Accordingly, the plaintiff's motion for summary judgment is granted and the defendant's cross-motion is denied.

DEPARTMENT OF JUSTICE

OFFICE OF ALIEN PROPERTY

Before MICHAEL F. KRESKY, *Chief Hearing Examiner for Debt Claims*

Debt Claim No. 5024—Docket No. 51 34DC M105

In the Matter of

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

(J. A. Henckels, K. G., Alleged Debtor)

ORDER ON MOTION TO DISMISS SEPARABLE PARTS OF DEBT CLAIM

STATEMENT

This debt claim came to be heard on Motion to Dismiss filed by the Chief of the Claims Branch on May 23, 1951, pursuant to section 502.27 of the Rules of Procedure for Claims of this Office, 8 CFR Part 502. The motion seeks to eliminate from the claim that portion based on interest on the principal amount of the alleged debt from August 18, 1941, until payment of the principal. The motion alleges that such interest is not allowable as part of a debt claim under section 34 of the Trading with the Enemy Act, as amended, 50 U. S. C. App., section 34.

The Notice of Claim (Form APC–1C), filed April 17, 1946, asserts a debt claim in the amount of $100,060, together with interest thereon from August 18, 1941 to date at the rate of 4.7% per

annum, amounting to approximately $47,000. The basis of the claim is eight bills of exchange, which were drawn by the alleged debtor and accepted and discounted by claimant. The date of maturity of each of these bills of exchange was August 18, 1941. Payment was made to claimant of the principal amount of the indebtedness, represented by these bills of exchange on August 15, 1951, but no interest has been paid.

The Motion to Dismiss is based on two grounds:

1. That interest is not allowable for the period after vesting under section 34 of the Trading with the Enemy Act, as amended.

2. That the imposition of freezing controls under Executive Order 8389 made it legally impossible for the alleged debtor to pay the bills of exchange at maturity and thereby relieved it from liability for interest. Claimant opposes the motion on both grounds.

By agreement of the parties, the matter has been submitted on briefs without oral argument upon the understanding that the claim as filed and supplemented would constitute the record in the case.

OPINION

1. On the first question claimant argues that interest is payable on debt claims under the Trading with the Enemy Act, and cites *Miller* v. *Robertson*, 266 U. S. 243, *Hicks* v. *Guinness*, 269 U. S. 71, and *Sutherland* v. *Kanawha Valley Bank*, 48 F. 2d 1027, in support of its position. This argument and its supporting authorities were fully considered by the Director of this Office in the Matter of Dorothy Krets Lehmann, Debt Claim

No. 3848, and in his decision it was held that interest for the period after vesting could not be allowed because the sovereign is immune from charges of interest unless expressly provided for by statute. This decision was affirmed by the United States District Court for the District of Columbia under the title of *Kay* v. *McGrath*, December 5, 1950, and is binding on me in this proceeding.

Claimant attempts to distinguish this case from the Lehmann matter by drawing a distinction between contractual interest and interest as damages. The decision in the Lehmann matter, however, leaves no opportunity for thus narrowing its effect. It was based on the finding that upon vesting, the property of the alien enemy becomes the absolute property of the government and that, therefore, the rule of sovereign immunity applies to claims against it. Hence interest, whether contractual or as damages, is barred except as expressly provided by statute. There is, of course, no such statutory provision. It follows that the motion must be granted as to post-vesting interest.

2. The Chief of the Claims Branch cites authorities for the proposition that interest after maturity on a claim maturing after the outbreak of war is barred because of the impossibility on the part of the debtor of paying the principal debt when due; and argues that the imposition of freezing controls has the same effect as the outbreak of war. On this basis, he contends that interest from August 18, 1941, the maturity date of the bills, to August 8, 1942, the effective date of the vesting order, is barred, and that the claim

should be dismissed as to such interest also. In order to grant the motion on this phase of the case it would be necessary for me to make a finding that the debt did not mature until after the effective date of Executive Order 8389. This I cannot do.

The Supplement to Item 9 of Form APC–1C filed by claimant sets forth the history of the transactions here involved. It dates from 1931, when the Seven Power Conference was held in London, and requested concerted measures by the Foreign Bank Creditors of German debtors to maintain the volume of credits already extended to German banks and industries. This resulted in a series of annual agreements from 1931 to 1940, under which short term credits became revolving credits, which German bank, commercial, or industrial debtors could use during the life of each agreement. The inference from this is that the whole arrangement was made because the German debtors were already in default. The final paragraph of this supplement reads as follows:

> The events of 1941 necessarily terminated all arrangements for the maintenance of "short-term credits" with German Debtors and the entire amount of these credits including the "cash advances" became due and payable, pursuant to Clause 19 which provides in part that all indebtedness arising under the "short term credits" covered by the Agreement shall mature on the expiration or termination thereof. The 1940 Agreement expired on May 31, 1941.

These statements are confirmed by the German-American Standstill Agreement of 1940, a copy of which has been furnished by claimant.

Whether the bookkeeping department of claimant actually debited the account is of little consequence; the rights of the parties were fixed by the terms of the agreement, and their rights are the controlling consideration. The agreement provided that the creditors should be entitled to debit such accounts with the amount of the bills "notwithstanding the fact that the bills themselves are drawn for later maturity." The further statement "no interest shall be chargeable until the bills mature" apparently is made because interest to the date of maturity was charged when the bills were discounted.

From the foregoing it appears that the claim should not be dismissed as to interest from August 18, 1941 to August 8, 1942.

ORDER

ACCORDINGLY, it is Ordered that the portion of this claim covering interest for the period from and after the effective date of the vesting order, August 8, 1942, be and it is hereby dismissed and disallowed;

It is Further Ordered that the Motion to Dismiss be and it is hereby denied as to the portion of the claim covering interest from August 18, 1941 to August 8, 1942.

MICHAEL F. KRESKY,
Chief Hearing Examiner for Debt Claims.

Dated at Washington, D. C., November 26, 1951.

APPENDIX B

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1 *et seq:*

SEC. 5. (b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the

terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been con-

veyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian

or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

SEC. 12. * * *

After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: *Provided, however,* That on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the

person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court: * * *

* * * * *

SEC. 34. (a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1–6 of the Criminal Code, title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat.

1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U. S. C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time extend beyond the expiration of two years from the date of the last vesting in or transfer to the Custodian of any property or interest of a

debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication of the first such notice in respect of the debtor, nor in any event shall any payment of a debt claim be made out of any property or interest or proceeds in respect of which a suit or proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The Custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part.

(d) Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the

payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the United States District Court for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record

shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the United States District Court for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good

cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed $600; (2) claims entitled to priority under sections 191 and 193 of title 31 of the United States Code, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for

goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d) hereof, payment may be made permits payment in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof, or the District of Columbia, solely by reason of becoming a debt due or owing to the United States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided*, That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely

by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

* * * * *

SEC. 36. (a) The vesting in or transfer to the Alien Property Custodian of any property or interest (other than any property or interest acquired by the United States prior to December 18, 1941), or the receipt by him of any earnings, increment, or proceeds thereof shall not render inapplicable any Federal, State, Territorial, or local tax for any period prior or subsequent to the date of such vesting or transfer, nor render applicable the exemptions provided in title II of the Social Security Act with respect to service performed in the employ of the United States Government or of any instrumentality of the United States.

(b) The Alien Property Custodian shall, nothwithstanding the filing of any claim or the institution of any suit under this Act, pay any tax incident to any such property or interest, or the earnings, increment, or proceeds thereof, at the earliest time appearing to him to be not contrary to the interest of the United States. The former owner shall not be liable for any such tax accruing while such property, interest, earnings, increment, or proceeds are held by the Alien Property Custodian, unless they are returned pursuant to this Act without payment of such tax by the Alien Property Custodian. Every such tax shall be paid by the Alien Property Custodian to the same extent, as nearly as may be deemed practicable, as though the property or interest had not been vested in or transferred to the Alien Property Custodian, and shall be paid only out of the property or interest, or earnings, increment, or proceeds thereof, to which they are incident or out of other property or interests acquired from the same former owner, or earnings, increment, or proceeds thereof. No tax liability may be enforced from any property or interest or the earnings, increment, or proceeds thereof while held by the Alien Property Custodian except with his consent. Where any property or interest is transferred, otherwise than pursuant to section 9(a) or 32 hereof, the Alien Property Custodian may transfer the property or interest free and clear of any tax, except to the extent of any lien for a tax existing and perfected at the date of vesting, and the proceeds of such transfer shall, for tax purposes, replace the property or interest in the hands of the Alien Property Custodian.

(c) Subject to the provisions of subsection (b) hereof, the manner of computing any Federal taxes, including without limitation by reason of this enumeration, the applicability in such computation of credits, deductions, and exemptions to which the former owner is or would be entitled, and the time and manner of any payment of such taxes and the extent of any compliance by the Custodian with provisions of Federal law and regulations applicable with respect to Federal taxes, shall be in accordance with regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury to effectuate this section. Statutes of limitations on assessment, collection, refund, or credit of Federal taxes shall be suspended, with respect to any vested property or interest, or the earnings, increment or proceeds thereof, while vested and for six months thereafter; but no interest shall be paid upon any refund with respect to any period during which the statute of limitations is so suspended.

(d) The word "tax" as used in this section shall include, without limitation by reason of this enumeration, any property, income, excess-profits, war-profits, excise, estate and employment tax, import duty, and special assessment; and also any interest, penalty, additional amount, or addition thereto not arising from any act, omission, neglect, failure, or delay on the part of the Custodian.

* * * * *

SEC. 39. No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred

to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946.

* * * * *

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IN THE

Supreme Court of the United States

No. 332

OCTOBER TERM, 1954

HERBERT BROWNELL, JR., Attorney General, as Successor to the Alien Property Custodian, *Petitioner*,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are printed at pages 15-28 of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

In the opinion of respondent, the question presented is:

Whether the Congress, without redefining the word "debt" as used in the Trading With the Enemy Act, overruled *Miller* v. *Robertson*, 266 U.S. 243 (1924), and thereby precluded payment of interest on debt claims by changing certain provisions as to the disposition of residual funds remaining after the payment of such debt claims and other costs of administration.

STATUTES INVOLVED

Relevant provisions of the Trading With the Enemy Act, as amended, are set forth in Appendix B of the Petition, at pages 29-43.

STATEMENT

The facts are not in dispute and respondent concurs in the statement set forth in the Petition, pages 2-4.

ARGUMENT

The petitioner, as successor to the Alien Property Custodian, has paid the principal of the debt due to respondent from J. A. Henckels, K.G., a national of Germany, and has allowed the pre-vesting interest on this debt at the stipulated rate of 3.25% per annum. Thus, as stated by the Court of Appeals (Petition, page 17), "we are presented with the single question of whether or not, as a matter of law, the amended Act authorizes payment of *post*-vesting interest, as well as *pre*-vesting interest, to a creditor whose claim matured prior to the outbreak of hostilities and whose statutory right to recover the principal amount is conceded." As the Court of Appeals said (Peti-

tion, page 17), "there was a matured debt with a contract provision for interest running from Henckels to appellee", now respondent.

This case turns on the effect of the World War II amendments to the Trading With the Enemy Act, hereinafter sometimes called the Act. The specific question is "What constitutes a debt?" Neither the old Act nor the amendments contains a definition.

Petitioner must concede that under the decisions which followed World War I a "debt" included full contractual interest, both pre-vesting and post-vesting. But petitioner argues that the World War II amendments, without redefining the word "debt", overruled the World War I decisions and thereby precluded payment of post-vesting interest. There is nothing in the Congressional history to support this argument and nothing to support it in any of the cases which have considered the World War II amendments.

Much as we might enjoy the privilege of arguing the case before this Court, the decision below is clearly correct and we see no reason for certiorari.

THE DECISION BELOW IS CLEARLY CORRECT

Petitioner opens his "reasons for granting the writ" by stating that the decision of the Court of Appeals runs counter to the well-settled rule that the United States is not to be required to pay interest in the absence of express statutory provisions therefor. The statement is only half complete. It should say, as do the cases which petitioner cites in footnote 1, "in the absence of an express provision in the relevant statute or contract." Petitioner then says, "The proceeding is clearly a suit against the United States." These arguments are not new. They were advanced and rejected in the World War I cases.

As we said before, the World War II amendments do not redefine the word "debt". Neither the old Act nor the amendments contains a definition, but the decisions which

followed World War I held that a "debt" included full contractual interest, both pre-vesting and post-vesting.

The then Alien Property Custodian argued, as petitioner does now, that the "suit is against the United States" and therefore payment of interest is prevented under the doctrine of sovereign immunity. This contention was rejected in *Miller* v. *Robertson*, 266 U.S. 243 (1924). The Court said at page 257:

> "While the suit, as held in *Banco Mexicano* v. *Deutsche Bank*, 263 U.S. 591, 603 (affirming 289 Fed. 924) is one against the United States, the claim was not against it. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity from liability for interest [citing cases] does not apply."

To the same effect see *Hicks* v. *Guinness*, 269 U.S. 71 (1925), where the Court said at page 81:

> "The denial of interest for the time covered by the war seems to us wrong. The cause of action had accrued before the war began, *Young* v. *Godbe*, 15 Wall. 562, and after it had accrued the question was no longer one of excuse for not performing a contract, but of the continuance of a liability for damages that had become fixed. The obligation of a contract is subject to implied exceptions, but when a liability is incurred by wrong or default it is absolute. Interest is due as one of its incidentals, and inability to pay it no more excuses from that than it does from the principal amount. Of course, while the damages remain unpaid, interest during one time is as necessary as interest during another to effect the indemnification to which the delinquent is held by the law. There are indications that local and momentary interests have led to a diversity of decisions, but here again what we regard as principle has prevailed in later days [citing cases] * * *."

Each of these cases held that the claimant was entitled to full interest, and the World War II amendments afford no basis for a different result.

The pertinent portions of the old Act were in Section 9(a) and read:

> "That any person not an enemy or an ally of an enemy * * * to whom any debt may be owing * * * may institute a suit in equity to establish the debt so claimed * * *."

The pertinent portions of the amendments are in Section 34(a) and read:

> "Any property or interest vested in or transferred to the Alien Property Custodian * * * shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. * * *"

We see no basis for the argument that a "debt" within the meaning of Section 34(a) is any different from a "debt" within the meaning of former Section 9(a). Apparently the Congress did not intend any difference. *Senate Report No. 1839,* 79th Congress, 2d Session, states at page 4:

> "Section 34 is not a radical departure from the treatment of debt claims in World War I since the principles of payment and of judicial determination are preserved. There is no intent to depart from established judicial precedents in this field with respect to such matters as to what constitutes a 'debt' except where express changes would be made by Section 34. The principal change is from 'first come, first served' to 'equitable distribution'."

House Report No. 2398, 79th Congress, 2d Session, has the same statement on page 10.

Despite such evidence of Congressional intent, petitioner contends that the theory of the statute has been changed and therefore the meaning of the word "debt". He says, on page 6 of his Petition, that the Act at the time *Miller*

v. *Robertson* was decided had "a conservatory purpose" but that "an entirely different philosophy underlies the World War II amendments." Petitioner in effect argues that the Congress by mere implication changed the "established judicial precedents * * * as to what constitutes a 'debt'."

The argument of change by implication also is not new. It has been advanced and rejected before in connection with the World War II amendments.

In *Markham* v. *Cabell*, 326 U.S. 404 (1945), the Government argued that the 1941 amendment to Section 5(b) of the Act had impliedly nullified the right of a creditor to maintain a suit under Section 9(a); this was prior to the adoption of Section 34(a). The Court rejected this argument, saying at pages 410-411:

> "We have concluded that however meritorious these considerations are, they raise questions of policy for Congress. We are concerned only with the right to sue on a debt under §9. Congress granted that right to some claimants and withheld it from others. Whether its choice was wise or not is not for us to say. The right to sue, explicitly granted by §9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission. We can find no indication in the 1941 legislation that Congress by amending §5(b) desired to delete or wholly nullify §9(a)."

The same argument was advanced in *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480 (1947), where the Government contended that the amendment to Section 5(b) had nullified the remedy for the return of property under Section 9(a). Again this contention was rejected, the Court saying at pages 486-487:

> "Petitioner therefore suggests that once the seizure is shown to be permissible under §5(b), there is no remedy for the return of the property under §9(a). It is said that §9(a) was designed to provide an ultimate judicial determination of the question whether

the property seized was within the vesting power defined in §5(b). *Central Trust Co.* v. *Garvan*, 254 U.S. 554, 567-568. The argument accordingly is that since §5(b) allows seizure and vesting of 'any property or interest of any foreign country or national thereof,' a suit to reclaim it is defeated by a mere showing that the claimant is a corporation organized under the laws of another nation.

"That is to make the right to sue run not to 'any person not an enemy or ally of enemy' as §9(a) in terms provides but to 'any person not an enemy or ally of enemy or national of any foreign country'. That would wipe out all suits to reclaim property brought by any foreign interest, no matter how friendly. We stated in *Markham* v. *Cabell*, 326 U.S. 404, 410-411, 'The right to sue, explicitly granted by §9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission.' Such a drastic contraction, if not complete sterilization, of §9(a) as petitioner suggests should therefore be made only if no other alternative is open."

In *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952), the Government argued that the Congress in 1948 adopted a policy of non-return and thereby prohibited the restoration of vested property to a national of Germany, resident in Hawaii. This argument was based on the theory that new Section 39 was an implied amendment of the portion of Section 9(a) which permitted a non-enemy to bring such a suit. The court rejected this argument and held that plaintiff was entitled to sue.

The Court of Appeals in the decision below followed the same theory and refused to read out of the law the right of the respondent to receive full contractual interest. In other words, the Court below refused to redefine the word "debt" merely by implication. The decision below not only is in accord with the three cases cited above but also is in accord with the two more recent cases which have said that the Act, as amended, is still for the protection of American creditors.

In *Clark* v. *Allen*, 331 U.S. 503 (1947), the Court was concerned with the right of German nationals to inherit California real estate. In discussing this problem the Court said at page 511:

> "But more important, vesting does not necessarily deprive the alien enemy of all benefits of his inheritance. If he owes money to American creditors, the property will be applied to the payment of his debts."

And in *Zittman* v. *McGrath*, 341 U.S. 471 (1951), sometimes referred to as the *Second Zittman case*, the Court considered the right of the Custodian to possession of accounts which had been subject to prior attachments in the New York State Courts. In upholding the Custodian's right to "possession", the Court said at pages 473-474:

> "While the statute under which the funds are to be 'held, administered and accounted for' authorizes the vesting of such foreign-owned property in the Custodian and its administration 'in the interest of and for the benefit of the United States,' it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds 'shall be equitably applied' for the payment of debts. If the Custodian disallows a claim, or if he disallows a claim of priority where claims exceed assets, the claimant may seek relief in the United States District Court for the District of Columbia. The transfer of possession of these funds does not purport to work any automatic deprivation of rights of any class of creditors, but takes over the estate for administration."

The footnotes to the above quotations from *Clark* v. *Allen* and *Zittman* v. *McGrath* both refer specifically to new Section 34 of the Act. There is no suggestion that the meaning of the word "debt" has been changed.

The core of the arguments advanced by the petitioner is that property in his hands as successor to the Alien

Property Custodian is essentially property belonging to the United States and that, therefore, creditors' claims to recover debts owed by the enemy debtors are claims against the United States. Petitioner would place the present action in the same category as one to recover on an obligation of the United States; in other words, that contrary to *Miller* v. *Robertson, supra,* the claim is *now* against the United States.

The difficulty in reading such a drastic change into the statutory scheme lies not only in the expressed Congressional intent not to depart from established judicial precedents with respect to such matters as what constitutes a "debt" but also in the fact that if the Congress had wished to preclude payment of contractual post-vesting interest it could have said so. As this Court pointed out in the footnote on page 316 of the Opinion in *Guessefeldt* v. *McGrath, supra,* the Congress at one time considered suspending payment of all debt claims—principal as well as interest. But there were two ends to be served. One—unchanged by the amendments—was the policy of payment of "debts" owed by enemy debtors to American creditors. The other—substantially changed by the amendments—was the disposition of the residue, i.e., as stated in Section 39 of the Act, "the net proceeds remaining upon the completion of administration, liquidation and disposition pursuant to the provisions of this Act."

Petitioner's discussion of changes in the Act as to the disposition of the residue contains nothing which bears directly upon the payment of debt claims. Petitioner cites legislative history and other authority regarding changes in the rights of enemy aliens but none as to any changes in the rights of American creditors. Lacking such authority petitioner falls back on the proposition that interest is not paid on claims against the United States.

Petitioner argues that the United States is actually the debtor. The obvious weakness in the argument is that the United States is no more the debtor under the present

statute than it was before. The United States still has no independent liability of any kind. Petitioner, as successor to the Alien Property Custodian, is first a custodian who, as stated in the *Second Zittman case, supra,* "takes over the estate for administration." Just as any executor or administrator he must first pay obligations incurred by the person whose estate he has taken over for administration before he can dispose of the residue.

The obligation to pay in the present case did not arise under any contract with the United States. Payment does not come out of any Congressional appropriation, but, as stated in the first sentence of Section 34 (d), "only out of" property which was "owned by the debtor".

If the United States were the "debtor", if the claim were against it, then the value of the vested property would be immaterial. Fortunately, the net proceeds from the vested property are more than enough for full payment of repondent's claim, including both pre-vesting interest and post-vesting interest. But if the money available from the Henckels property "for the payment of debt claims against the debtor' had been insufficient respondent could not look to the United States for the deficiency but, as stated in the second sentence of Section 34(d), would be limited to "ratable payments". Clearly the United States is not the "debtor" today anymore than it was under the old Act. To paraphrase *Miller* v. *Robertson, supra,* no debt is owing from the United States to respondent and "the rule of sovereign immunity from liability for interest does not apply."

The decision below is clearly correct. The Court of Appeals properly refused to depart from the established judicial precedents as to what constitutes a "debt" and, like this Court treated the present statute as "a liquidation measure for the protection of American creditors." *Zittman* v. *McGrath, supra.*

THERE IS NO CONFLICT OF DECISION

Petitioner does not claim any conflict of decision and we know of none. The only other World War II case dealing with post-vesting interest is *Kay* v. *McGrath* decided in 1950 by Judge McGuire of the United States District Court for District of Columbia. This is the case cited by the hearing examiner (Petition, page 26) as the basis for his decision denying post-vesting interest.

Kay v. *McGrath* affirmed a denial of post-vesting interest on an alimony claim. However, Judge McGuire's memorandum opinion, a copy of which is set forth as a supplement to this brief, discusses contractual interest and says:

> "*Miller* v. *Robertson*, 266 U.S. 243, 257, 258 * * * is still controlling * * *."

As the Court of Appeals pointed out in the decision below (Petition, page 21), *Kay* v. *McGrath* does not purport to abrogate *Miller* v. *Robertson* "when, as in the present situation, interest flows from contract."

IMPORTANCE OF QUESTION

Petitioner states, on page 13 of the Petition, that "the question presented has substantial importance." It does, to a limited number of people in a limited number of situations. Admittedly, this case does not involve any constitutional issue. And, in our opinion, does not involve any question of general consequence or national importance. We believe that the decision of the Court of Appeals is correct and see no need for a decision by this Court.

CONCLUSION

As stated in *Senate Report No. 1839, supra,* Congress did not intend "a radical departure from the treatment of debt claims in World War I". Section 34 preserved "the principles of payment and of judicial determination".

There was "no intent to depart from established judicial precedents in this field with respect to such matters as to what constitutes a 'debt' except where express changes" were made.

The cases which followed World War I held that a "debt" included post-vesting contractual interest. Obviously these cases are the "established judicial precedents" to which the Senate and the House reports both referred. There is no express change regarding interest in Section 34. Therefore, we must conclude that the Court of Appeals correctly decided that a "debt", within the meaning of Section 34, includes post-vesting contractual interest.

Further, in our opinion, the questions involved are not of sufficient general consequence or importance to warrant certiorari.

Respectfully submitted,

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Dated October 5, 1954.

SUPPLEMENT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 456-49

ANITA KAY, as Administratrix of the Estate of Dorothy Krets Lehmann, deceased, *Plaintiff*,

v.

J. HOWARD MCGRATH, Attorney General of the United States of America, Successor to the Alien Property Custodian, *Defendant*.

[This is an action instituted by plaintiff's decedent under section 34 (e) of the Trading With the Enemy Act, as amended, for review of the determination of the defendant, acting through the Director of this Office, dated December 8, 1948, disallowing her claim insofar as it sought interest from and after November 11, 1942, the date of the vesting of the enemy debtor's property. The Director had concluded that section 34 did not permit interest on debt claims accruing after vesting of the debtor's property since a claim under section 34 was one against the United States and section 34 contained no provision for the payment of interest on claims (see *Matter of Dorothy Krets Lehmann*, Claim No. 3848).]

MEMORANDUM

I do not think it can be gainsaid that interest in its nature is money paid for the use of money or for forbearance in demanding it when due—and that wherever it is allowed either by common law or by statute, it is allowable by reason of delay or default of the debtor—except where there is a contract to pay the same. *U.S.* v. *Sherman*, 98 U.S. 565.

There is no debtor-creditor relationship here, and no agreement upon the part of the Government to pay interest, so plaintiff's claim is without merit and fails as a consequence.

Those cases dealing with the payment of interest where the Government is the holder of the money under various federal statutes, reveals no case in which interest was allowed, *except* where *prior* to the Government succeeding to the custody of the debtor the latter had *wrongfully* withheld the funds in question. Factually this case falls without that category. *Miller* v. *Robertson*, 266 U.S. 243, 257, 258, supports this view, nor does any subsequent change in the law affect it—the case is still controlling and alluding as it does to the general principle here referred to.

Counsel will prepare necessary papers.

/s/ MATTHEW F. MCGUIRE
Judge

November 6, 1950